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No. 89-1472

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ACW AIRWALL, INC., *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners ACW Airwall, Inc., *et al.*, submit this reply to respondent's brief in opposition.

1. Respondent speculates that granting the relief petitioners seek might undermine the Phase One settlement agreements, because "there would be no way to prevent parties to the more than fifty settlement agreements executed thus far from seeking relief under Rule 60(b), jeopardizing everything accomplished thus far." (Opp. 22) But that hypothesis simply has no foundation. Petitioners had nothing whatsoever to do with the Phase One settlements. Rather, those settlements were entered into voluntarily by the PSC and the hotel-related defendants. Because counsel for both the PSC and the hotel have long been aware of Judge Acosta's law clerk-related con-

flicts of interest,[1] they cannot be heard to challenge their settlement agreements on any of the grounds listed in Federal Rule of Civil Procedure 60(b) or on any other basis.

2. Respondent suggests that petitioners should be deemed to have unreasonably delayed in moving for recusal because petitioners should have somehow discovered the law clerks' improper relationships with counsel long before they in fact did. (*See, e.g.*, Opp. 18-19) But Section 455(a) does not contemplate that a motion is untimely if the movant has failed to piece together stray clues of a potentially disqualifying relationship, especially where that relationship is known to, but not disclosed by, the judge and opposing counsel. And in any event, there is nothing in the record to support a charge of unreasonable delay. As the affidavits in the appendix to the petition clearly show (Pet. App. 80a-111a), petitioners did not in fact know of the conflicts until a meeting of defense counsel on or about July 20 or 21, 1989. At that meeting, defense counsel discussed what was then only a rumor that Richard Graffam, Judge Acosta's law clerk, was the brother of William Graffam, and that David C. Indiano, a member of the PSC, was a partner in William Graffam's law firm. Following investigation of this rumor, which took only eight business days, petitioners raised their concerns with Judge Acosta. Under any standard, eight business days to ensure the accuracy of information of such significance is simply not unreasonable delay.

3. The record does not support respondent's suggestion that Judge Acosta was entirely innocent in not disclosing his law clerks' conflicts of interest on the record. Both Judge Acosta and the PSC sought to mask a central fact that petitioners fortuitously discovered only after they filed their mandamus petition: in *Pan American Grain*,

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[1] *See* Sworn Statement of Charles A. Cordero (Pet. App. 112); Declaration of Gary L. Bostwick (Pet. App. 114a).

Inc. v. M/V Freedom,[2] an unreported decision handed down only months before this case began, Judge Acosta held that he was required to recuse himself because Richard Graffam, his law clerk, was the brother of counsel for defendants, William Graffam.[3] *Pan American* makes clear that Judge Acosta fully understood that relationships such as that of the Graffam brothers create an appearance of partiality. Having recently himself ruled that the very relationships here at issue create an appearance of partiality, Judge Acosta's failure to so much as disclose those relationships in this case cannot so lightly be brushed aside as "innocent."

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for a writ of *certiorari*, the Court should grant the petition.

Respectfully submitted,

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[2] No. 84-1795 (D.P.R. Sept. 19, 1986) (Pet. App. 116a).

[3] Interestingly, Harvey Nachman, a member of the PSC who signed the brief in opposition, was counsel for plaintiff seeking recusal in that case. We note that there is not even a single cite to *Pan American* in the brief in opposition.